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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959 No. 67

Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman and Joseph R. Friedman,
Appellants,

v.

Thomas J. Gibbons, Commissioner of Police of the City of Philadelphia, and Victor H. Blanc, District Attorney of the City of Philadelphia,

and

Pennsylvania Retailers' Association, Intervening Defendant,
Appellees.

On Appeal from the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. § 2281 *et seq.*

MEMORANDUM IN SUPPORT OF JURISDICTION AND CONSOLIDATION

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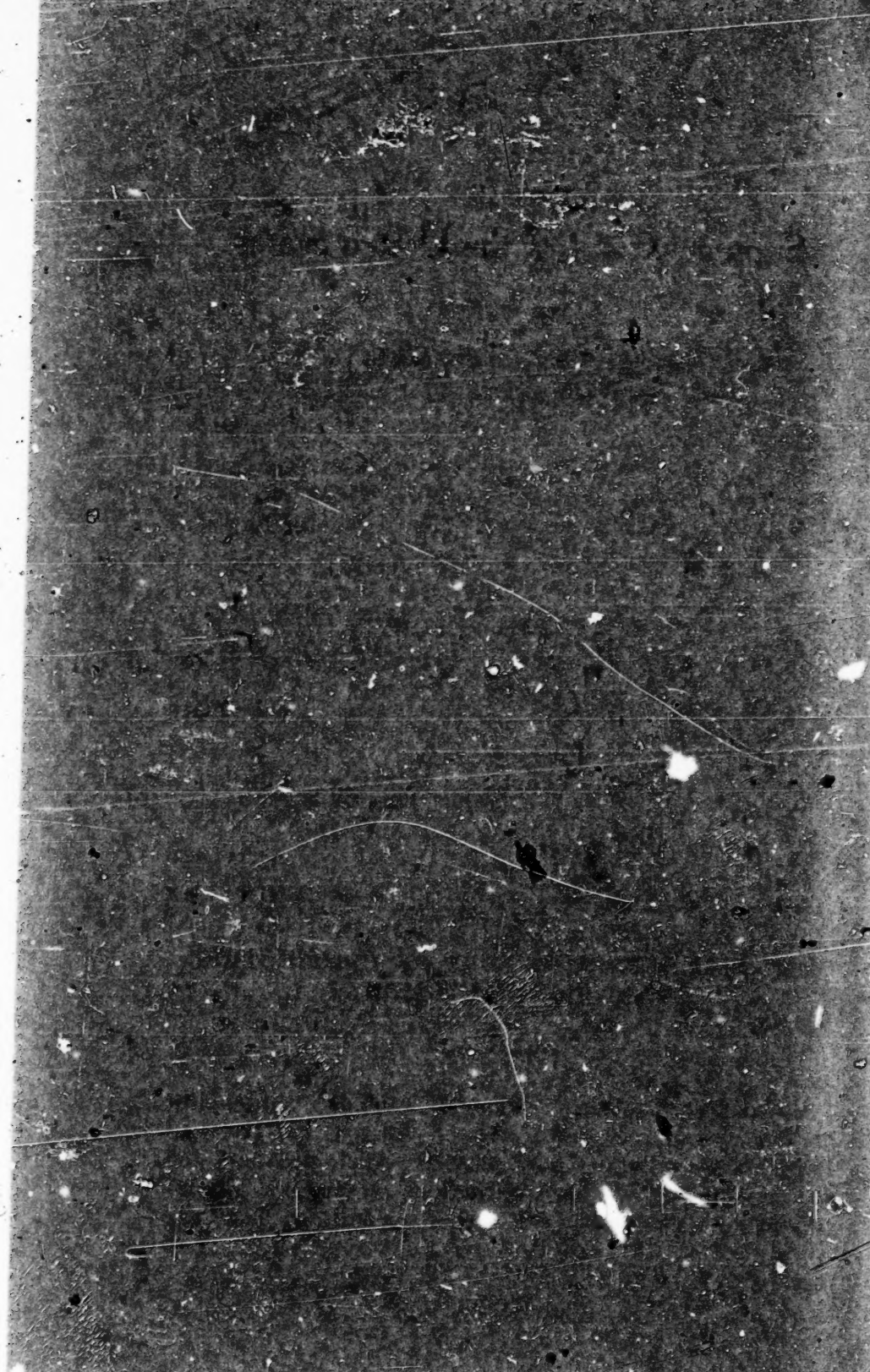

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959. No. 845.

Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman and Joseph R. Friedman,
Appellants,

v.

Thomas J. Gibbons, Commissioner of Police of the City of Philadelphia, and Victor H. Blanc, District Attorney of the City of Philadelphia,

and

Pennsylvania Retailers' Association, Intervening Defendant,
Appellees.

MEMORANDUM IN SUPPORT OF JURISDICTION AND CONSOLIDATION.

This case involves a challenge to the constitutionality of Pennsylvania Act No. 212 of August 10, 1959, 18 Purdon's Pa. Stats. Ann. § 4699.10, which prohibits the sale at retail of certain commodities on Sunday. Plaintiffs are merchants who sell such commodities. They are

also Orthodox Jews who, in accordance with the precepts of their religion, close their business establishments on the Jewish Sabbath.

Upon motion filed at the hearing on plaintiffs' motion for a temporary restraining order, Pennsylvania Retailers' Association was granted leave by the three-judge District Court to intervene as a party defendant in this action. The Association participated in the trial of the action, filed briefs and presented oral argument.

On April 25, 1960, this Court noted probable jurisdiction in three other cases involving Sunday laws:

> No. 438, *McGowan* v. *Maryland;*
>
> No. 532, *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.;*
>
> No. 699, *Two Guys from Harrison-Allentown, Inc.* v. *McGinley.*

Pennsylvania Retailers' Association asserts that the final order of the three-court judge court filed on December 16, 1959 dismissing plaintiffs' amended complaint in the present action should be affirmed. However, in view of this Court's action in noting probable jurisdiction in the three cases cited above, the Association does not oppose the granting of the appeal here. To the contrary, the Association hereby urges the Court to note probable jurisdiction and respectfully requests the Court to list this case for argument together with Nos. 438, 532 and 699, so that a complete consideration of all of the relevant issues with regard to Sunday laws may be had at the same time.

In support of its position, Pennsylvania Retailers' Association submits that, on the basis of the allegations of plaintiffs' amended complaint, the present case involves issues which will not necessarily be disposed of by this Court's decisions in the three Sunday law cases above cited in which probable jurisdiction has been noted.

The present action is the only Sunday law case before this Court which squarely raises the economic

impact of Sunday selling laws upon Orthodox Judaism. Plaintiffs sell merchandise which is totally devoid of any religious connotation, namely, wearing apparel and home furnishings." (Jurisdictional Statement, p. 6). Their competitors enjoy their greatest volume of business during the Jewish Sabbath when plaintiffs are closed. (Jurisdictional Statement, p. 7).

By contrast, in the case of the supermarket involved in the Massachusetts appeal, No. 532, "all of its meats and meat products are kosher, and something like 95 per cent of the rest of its stock is kosher." 176 F. Supp. 466, 469. "A very substantial percentage of the corporate plaintiff's customers are Orthodox Jews, and most of the others are Conservative Jews who observe the Jewish Sabbath." *Ibid.* Most of Crown Kosher's customers, unlike those of the present plaintiffs, will not patronize someone else on the Jewish Sabbath; and Crown Kosher's products will have little, if any, attraction for non-Jewish shoppers. Thus the basic question in No. 532 is the inconvenience to Jews who strictly observe the Sabbath and also are not permitted to buy and sell on Sundays, as opposed to the actual loss of business alleged in the present action.

Both the other two appeals, Nos. 438 and 699, involve Sunday sales by affiliated corporations which can have no religious connections whatsoever and operate seven days a week. Moreover, in those cases, the standing of the parties to raise constitutional questions with regard to religious freedom is at least highly questionable. See the opinion of the District Court in No. 532 with regard to the corporate plaintiff there. 176 F. Supp. 466, 472.

While No. 532 and the present case both involve individual plaintiffs who clearly have standing to raise the religious constitutional issues, there are nonetheless significant differences between those two cases other than the one previously mentioned. No. 532 involves an old law of general application as to which the religious background was found by the District Court to be clear. The

present action concerns an enactment of the Pennsylvania legislature in 1959 as to which there is no such background and no equivalent finding by the District Court. The 1959 Pennsylvania Act is directed solely at Sunday retail selling, which selling the Pennsylvania legislature presumably found to be contrary to the public welfare. (Jurisdictional Statement, pp. 29-30.)

Moreover, the statute involved in No. 532 allegedly discriminates among different types of persons selling food. The Pennsylvania statute, to the contrary, treats all individuals who sell the subject commodities at retail in the same fashion. It is thus possible that this Court could decide No. 532 in favor of the plaintiffs on grounds of improper classification without reaching the religious constitutional issues. In the present action, the lack of discrimination between sellers of the same commodities could consistently be upheld so that the religious issues would have to be faced squarely.

For the above reasons, while asserting that the District Court's dismissal of plaintiffs' amended complaint should be affirmed, Pennsylvania Retailers' Association respectfully urges this Court to note probable jurisdiction in the present action and to list the case for argument together with Nos. 532, 438 and 699.

Respectfully submitted,

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